SHULMANKESSLER LLP

April 14, 2017

Via ECF
Hon. Leonard D. Wexler, U.S.D.J.
United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, NY 11722

Re: *Brandes v. Merrill Lynch & Co., Inc., et al.*
Case No. 16 Civ. 4754 (LDW) (AYS)

Dear Judge Wexler:

The parties write to jointly request that the Court approve the settlement reached in this matter. The parties submit that the Court should approve the Settlement Agreement (attached as Exhibit 1 to Declaration of Troy L. Kessler in Support of the Parties' Motion to Approve the FLSA Settlement ("Kessler Decl."))[1] and so order the Stipulation and Order of Dismissal with Prejudice (attached as Exhibit B to the Settlement Agreement). The settlement reflects a reasonable compromise over contested issues reached as a result of an arms-length negotiation between the parties, who were adequately represented by counsel. *See* Kessler Decl. ¶¶ 18, 20.

I. Background

Plaintiffs Dana Brandes, Stacy Niemiec, Dawn Bradford, Carrie A. Dubois, Connie Donatella Gorczyca and Luciana Leone and opt-in Plaintiffs Jennifer Eck, Kristina Kaufmann, Alfredo Lavalle, Jeffrey Smulevitz, Kevin Wu and Richard Yu (collectively, "Plaintiffs") worked for Defendants Merrill Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Bank of America (collectively, "Defendants") as Client Associates ("CAs"). On August 24, 2016, Plaintiffs filed a Complaint with this Court. ECF No. 1. On November 1, 2016, Plaintiffs filed an Amended Complaint. ECF No. 17. Plaintiffs alleged that Defendants violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201, *et seq.*, and parallel state statutes by failing to provide them with overtime premium pay for hours they worked over forty in a given workweek.

On February 21, 2017, the Parties appeared for an initial conference before the Hon. Sandra J. Feuerstein, U.S.D.J. Thereafter, Judge Feuerstein entered an Order of Recusal and the matter was reassigned to Your Honor.

The parties engaged in informal discovery, including the exchange of personnel files, payroll documents, paystubs, time cards, schedules and corporate policy documents. *See* Kessler

[1] All Exhibits hereinafter are attached to the Kessler Decl.

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Decl.¶ 19. Plaintiffs analyzed the documents and data produced by Defendants and based upon these records and Plaintiffs' allegations, calculated the approximate amount of damages owed. *Id.* Thereafter, the parties engaged in multiple rounds of negotiations and based on these negotiations, the parties agreed to settle. *Id.* ¶ 20. Defendants have agreed to settle this lawsuit without admitting any liability or wrongdoing.

II. Settlement Between Plaintiffs and Defendants

The parties have agreed to settle Plaintiffs' claims in the aggregate amount of $89,881.53. *See* Kessler Decl. ¶ 20. The proposed settlement provides that each Plaintiff will receive a payment based primarily on the length of time he or she was employed by Defendants as a CA. *Id.* ¶ 21. According to Plaintiffs' calculations, the proposed settlement represents 61% of Plaintiffs' best-case scenario. *Id.* ¶ 23.

III. The Proposed Settlement is Fair and Reasonable and Consistent with the Second Circuit's Decision in *Cheeks v. Freeport Pancake House.*

Parties may not enter into a FLSA settlement agreement and stipulate to dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) without court approval. *Cheeks v. Freeport Pancake House, Inc.*, 769 F.3d 199, 206 (2d Cir. 2015); *see also Wolinsky v. Scholastic Inc.*, 900 F.Supp.2d 332, 335 (S.D.N.Y. 2012) (district court must evaluate a settlement to determine if it is fair and reasonable).

The totality of the circumstances demonstrates the fairness and reasonableness of the proposed settlement. *See Gonzales v. Lovin Oven Catering of Suffolk, Inc.*, No. 14 Civ. 2824, 2015 WL 6550560, at *2 (E.D.N.Y. Oct. 28, 2015) (court should evaluate proposed settlement in light of all of the circumstances). To determine the reasonableness of a proposed settlement, courts examine five factors: "(1) plaintiff's range of possible recovery; (2) the extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses; (3) the seriousness of the litigation risks faced by the parties; (4) whether the settlement agreement is the product of arm's-length bargaining between experienced counsel; [and] (5) the possibility of fraud or collusion." *Wolinsky*, 900 F.Supp.2d at 335 (S.D.N.Y. 2012). Additionally, the Court should be mindful of the "admonitions" set forth in *Cheeks* – specifically, that overbroad releases and stringent confidentiality provisions are to be avoided. *Gonzales*, 2015 WL 6550560, at *1. The settlement here satisfies the five *Wolinksky* factors and does not conflict with the *Cheeks* admonitions.

The settlement is fair and reasonable because it represents approximately 61% of Plaintiffs' asserted best-case scenario for claims for unpaid overtime wages including liquidated damages. *See* Kessler Decl. ¶¶ 23-24; *Wang v. Masago Neo Asian Inc.*, No. 14 Civ. 6249, 2016 WL 7177514, at *2 (E.D.N.Y. Sept. 26, 2016) (recommending approval of settlement where plaintiffs estimated settlement as approximately 30 percent of potential damages). The second and third *Wolinsky* factors are met because both parties will avoid the expense and risk of a lengthy, fact-specific trial – particularly challenging in a case like this one where Plaintiffs must prove that they engaged in off-the-clock work. *See Riedel v. Acqua Ancien Bath N.Y. LLC*, No. 14 Civ. 7238, 2016 WL 3144375, at *7 (S.D.N.Y. May 19, 2016) (recognizing risks of proving damages for off-the-clock claims). The fourth and fifth *Wolinsky* factors are also satisfied because the settlement is the product of an arms-length negotiation and void of fraud or collusion. *See* Kessler Decl. ¶¶ 49, 50. The negotiations took place between experienced employment law attorneys and was conducted at arm's length. *See id*; *see also Rangel v. 639 Grand St. Meat & Produce Corp.*, No. 13 Civ. 3234, 2013 WL 5308277, at *1 (E.D.N.Y. Sept. 19, 2013) (approval appropriate where settlement "was the result of arm's length negotiations, which were undertaken in good faith by counsel") (citation and internal quotation omitted).

In addition, the types of provisions rejected by the Second Circuit in *Cheeks* are absent from the Settlement Agreement here. *See Gonzales*, 2015 WL 6550560, at *3 (noting the *Cheeks* court's concern with overbroad general releases and confidentiality provisions). The Settlement Agreement does not contain a confidentiality provision and provides only for a release of Plaintiffs' federal and state wage and hour claims against Defendants up to the date of the signing of the Settlement Agreement. *See* Ex. 1 § 4.1; *Romero v. Westbury Jeep Chrysler Dodge, Inc.*, No. 15 Civ. 4145, 2016 WL 1369389, at *2 (E.D.N.Y. Apr. 6, 2016) (approving FLSA settlement where agreement did not contain, *inter alia*, an overly broad release or confidentiality provision).

IV. Plaintiffs' Request for Approval of Attorneys' Fees and Costs is Reasonable.[2]

Plaintiffs request that the Court approve Plaintiffs' counsel's fees of 20% of the total Negotiated Settlement Payment, or $17,976.31. This request is reasonable, considering the time Plaintiffs' counsel spent litigating and resolving these claims. *See* Kessler Decl. ¶ 27. The requested fee is also less than the one-third contingency fees frequently approved as part of FLSA settlements in this district. *See, e.g.*, *Abrar v. 7-Eleven, Inc.*, No. 14 Civ. 6315, 2016 WL 1465360 *3 (E.D.N.Y. Apr. 14, 2016) (approving attorneys' fees for one third of the total settlement as fair and reasonable and collecting cases); *Rangel v. 639 Grand St. Meat & Produce Corp.*, No. 13 Civ. 3234, 2013 WL 5308277, at *1 (E.D.N.Y. Sept. 19, 2013) (approving attorneys' fees of one-third of FLSA settlement amount, plus costs, and noting that such a fee arrangement "is routinely approved by the courts in this Circuit").

[2] Defendants do not oppose Plaintiffs' request for approval of attorneys' fees and costs.

The practice in the Second Circuit has been to apply the percentage method and loosely use the lodestar method as a "cross check." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). Here, Plaintiffs' counsel's requested fee of 20% ($17,976.31) of the settlement compares favorably to Shulman Kessler LLP's lodestar of approximately $17,370.00. Kessler Decl. ¶ 33; *see Tiro v. Public House Invs., LLC*, No. 11 Civ. 7679, 2013 WL 4830949, at *12, *15-16 (S.D.N.Y. Sept. 10, 2013) (finding that where the lodestar was "virtually identical to the percentage of recovery," class counsel's request for attorney's fees was well within the range of reasonableness).

The Court should also consider whether the proposed attorneys' fees are reasonable based on: (1) time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50. Based on Plaintiffs' counsels' contemporaneous records documenting time and labor spent on reaching this settlement (Ex. 2 (Shulman Kessler Time Records)), the risks involved in litigating this matter, the quality of Plaintiffs' counsel's representation, and the public policy considerations, Plaintiffs respectfully request the Court approve Plaintiffs' counsels' requested attorneys' fees. *See* Kessler Decl. ¶ 32.

* * * *

Accordingly, Plaintiffs and Defendants respectfully request that Your Honor approve the settlement, and so order the Stipulation and Order of Dismissal with Prejudice attached as Exhibit B to the Parties' Settlement Agreement.

Thank you for your consideration of this matter.

Respectfully submitted,

/s/ Troy L. Kessler
Troy L. Kessler

cc: All Counsel (via ECF)